Supreme Court, U.S.
FILED
SEP 10 1999
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No. 99-252

IN THE

Supreme Court of the United States

COMBUSTION ENGINEERING, INC.,

Petitioner,

v.

LOIS A. MCGILL, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION

Respondents Lois A. McGill, *et al.*, respectfully request that this Court deny the petition for a writ of certiorari filed by Combustion Engineering, Inc. ("Combustion") in this case.

STATEMENT OF THE CASE

This water pollution case involves a punitive damage award of $1 million, not "a punitive award of over $4,000,000" as Combustion suggests in the opening sentence of its petition. Pet. 1. The $1 million punitive award that Combustion has actually brought before this Court is the last remaining judgment in a set of 13 separate judgments entered against Combustion as a result of its pollution of Graves Mountain, Georgia. Combustion has chosen to settle 12 of these 13 judgments, and it contests before this Court only the $1 million punitive award held by respondents.

In light of these settlements — the discussion of which Combustion relegates to a footnote in the middle of its petition, *see* Pet. 10 n.3 — Combustion, through its own actions, has failed to present a live controversy concerning the "punitive award of over $4,000,000" that "the court of appeals sustained," which is the central focus of its petition. Pet. 1. The petition should be denied for this reason alone.

The reasonableness of the $1 million punitive award still at issue in this case is plain from the undisputed fact established at trial that Combustion retained at least $6 million in extra profits through its failure to employ proper remediation measures on its Georgia minesite between 1987 and 1993. Tr. 1216-17.[1] As a result, the owners of the land surrounding Combustion's minesite, including respondents here, suffered from severe pollution in their streams. This violated well-settled Georgia law, which gives the surrounding landowners an absolute right against such a trespass

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[1] The trial transcript, which appears in Volumes 9 and 10 of the record, is cited throughout this opposition as "Tr. ___." The transcript of the hearing on the posttrial motions held on April 25, 1994, which appears in Volume 12 of the record, is cited as "4/25/94 Tr. ___."

on their riparian rights, even with reference to a mining company such as Combustion that could derive enormous benefit from polluting streams rather than cleaning up the pollution before it reaches the streams in question.

In order to recover more than $250,000 each in punitive damages, under controlling Georgia law plaintiffs were required to demonstrate, by clear and convincing evidence, that Combustion acted with specific intent to cause harm. The jury, district court (twice), and the court of appeals (twice) all determined that such specific intent to cause harm was shown.

To strike the punitive award would effectively give Combustion and similarly situated wrongdoers a power of *private* eminent domain to trespass intentionally on the property of others by appropriating their waterways to serve as waste-disposal systems for toxic materials. The relief Combustion seeks would undermine the ability of the States to protect private property rights — allowing defendants, backed by the federal judicial power, to engage in government-enforced private takings of property that would themselves raise serious questions under the "public use" requirement of the Takings Clause. Thus, although the federal Constitution is typically invoked as a constraint on damage awards, here the Fifth Amendment affirmatively supports upholding the punitive award as reasonable.

A. Statement of the Facts

During the relevant time period Combustion knew that, absent concerted efforts both at reclamation (i.e., long-term restoration) and remediation (i.e., immediate pollution treatment), huge quantities of toxic pollutants would flow into the four streams running onto the land of the surrounding landowners (hereinafter, "plaintiffs"), which in this litigation have been referred to as the Goldman, Long, Maloof, and McGill streams. To keep as much profit as possible, Combustion for years made only trivial reclamation efforts and no attempts at remediation, in the process retaining at least $6 million in extra profits. Not until

1991, five years after mining stopped, did Combustion begin remediation efforts on *any* of plaintiffs' streams. Even then, Combustion acted only because it was ordered to do so by state authorities and had already been sued by plaintiffs. The vast majority of Combustion's cleanup efforts occurred after suit was brought in this case in August 1991, and after the State of Georgia cited Combustion for a violation of law — a point not mentioned by Combustion in its continuing effort to claim credit for efforts taken under compulsion. *See* Pet. 3-5. Moreover, virtually all of the cleanup efforts that Combustion did make were focused on dismantling its plant and on relatively cheap *reclamation* efforts on its *own* land that did not benefit plaintiffs. The evidence at trial showed that Combustion made no serious effort to use readily available, effective measures to *remediate* the acid mine drainage being released onto *plaintiffs'* property, despite full knowledge that plaintiffs' streams were being polluted.

1. ***Combustion deliberately refused for years to adopt adequate cleanup measures***. When mining ceased on Graves Mountain in 1986, the site had been reduced to a cratered, rock-strewn plateau whose sides were pock-marked with at least 166 acres of open ditches, dams, and tailings ponds. *See* DX-12 at 1, 4-5; *see also* PX-3 (aerial photo of minesite taken in 1991).

The tailings in these open storage pits contained large quantities of pulverized pyrite which, when exposed to water and oxygen, creates sulfuric acid. Tr. 178-79. Through its failure to follow the standard industry practice of reclaiming the land while the mining was ongoing, Tr. 941, 1217, Combustion had created a "continuous supply . . . of sulfuric acid" that caused the water to become dangerously acidic (by lowering its pH) and to dissolve and transport heavy metals like iron, manganese, and aluminum. Tr. 99, 177-79. Streams were more prone to erosion and flooding. Tr. 181-82. Expert testimony established that "[y]ou have acid mine drainage coming from the old tailing and pyrite ponds and much of that is coming from the seepage from those areas and sub-surface flow. So it is not just a problem that you have when there

is a rainfall event." Tr. 107-08. It is this water — thousands of times more acidic than normal, and laced with toxic heavy metals — that has regularly flowed onto plaintiffs' property. *E.g.*, Tr. 108-10, 111-12, 178-82, 185, 190-92; PX-12 at 2.

Combustion failed to make any cleanup efforts for at least two years after mining ended in 1986, despite its obligation under a cleanup plan filed with state regulatory officials in 1985. *See* Court's Exhibit 1. The plan was designed to "protect[] adjacent watersheds" (cover page), and it specifically promised state regulators that no water "will be allowed to leave or flow from affected lands without proper treatment" meeting state and federal effluent standards (e.g., pH no lower than 6.0). *Id.* at 9. In particular, "to protect contiguous natural resources from suspended or dissolved solids," *id.*, the plan required Combustion to employ "timely and sufficient" remediation and reclamation techniques. The plan required that the cleanup be completed within 18 months, *id.* at 5 — a time limit that is standard industry practice. Tr. 717.

Combustion did not meet this deadline, and internal company memoranda showed that the delay was intentional. One memo, dated October 27, 1987, stated that the Georgia Department of Natural Resources ("DNR") was greatly concerned with acid mine drainage. PX-23, at 1. Rather than proposing action, the memo stated that Combustion's "relationship" with regulators "has been and should continue to be cultivated." *Id.* at 2. Another memo explained that the DNR official in charge of Graves Mountain — who had been pursuing the matter vigorously — was being replaced. The memo reported that the personnel change was "good news for [Combustion] because of the good working relationship we have established" with the replacement official. PX-39, at 1.

Even so, the DNR repeatedly raised concerns with Combustion about the pollution problem. For example, as a Combustion official summarized an October 1987 meeting:

> The single most important concern of the DNR is present and potential acid run-off. Mr. Tinley [a DNR official] produced a map on which had been noted several pH readings from streamlets in the area with origins both from the site works and natural springs. Although the natural springs from the area exhibited relatively low pH's of around 5, the water from the site works showed pH's of around 2.25 to 3 [hundreds of times more acidic than the natural streams].

PX-23 at 3. The DNR conducted some 70 pH tests; almost half demonstrated pH levels 1,000 times more acidic than normal. PX-7, PX-9. Despite this notice, by early March 1988 — when Combustion was supposed to have finished cleaning up Graves Mountain — the sum total of its supposed response had been to take a total of 10 pH readings from unimpacted streams and certain ditches and ponds, and to contemplate "plans" for future action. Tr. 947; PX-39; DX-5.

On March 15, 1988, Broughton Caldwell, a DNR scientist, visited the mountain to do more tests. He confirmed that pH values were highly acidic; that "iron precipitate" coated the leaves in the stream at one site; and that insect communities at each site were close to nonexistent. He concluded that the lack of biological diversity or abundance was related "in large part to the low pH values" and resulting "strongly acidic" water. PX-7. The day after Caldwell completed his study, DNR officials met with Combustion and reemphasized their concerns about "controlling . . . water discharge." PX-39. Combustion then agreed to begin some "preliminary work" "next week" and submit a "reclamation program and schedule . . . to the DNR." *Id.*

Yet after being notified in 1987 and 1988 by the DNR of the severe pollution flowing into plaintiffs' streams, Combustion failed to continue testing the streams, neglecting even to monitor the level of acid mine drainage that it knew was flowing onto plaintiffs' property. Tr. 372-73, 374, 391-92. Not until the end of 1988 — more than two years after the cessation of mining — did

Combustion adopt a revised reclamation plan. A county environmental health specialist testified that the measures consisted of "smooth[ing] up the roads, plant[ing] some grass," Tr. 539, which would clear up the pollution in plaintiffs' streams only indirectly and only after many years. Revegetation is necessarily a long-term cleanup measure because the vegetative cover has little, if any, effect on the pollution problem until it reaches the requisite thickness and maturity. Tr. 1017. John Brett, a top Combustion executive personally in charge of the site, testified that his hope was no more than that these reclamation measures would "evenually" stop the flow of pollution. Tr. 952.

Plaintiffs' expert witness, Dr. Claude Terry, testified that Combustion's efforts were "trivial." Tr. 748. Indeed, Dr. Terry testified that, in practice, Combustion did not follow its own plan. Tr. 737. For example, Combustion attempted to avoid its obligation under the 1985 reclamation plan to bury the tailings and pyrite ponds under four feet of topsoil to prevent oxidization of the pyrite, by starting the "West Pond 1" project, a futuristic greenhouse experiment in which Combustion scientists attempted to grow a kind of "miracle grass" — ground cover that could somehow thrive on bare mill tailings (toxic pulverized rock) that contained "considerable acidity" and were "almost devoid of nutrients essential to plant growth." DX-15 at 1, 3. Not surprisingly, this experiment failed; at the time of trial, nothing was growing on these areas, which Combustion had simply left bare. PX-3.

Combustion failed to correct the pollution problem even after a lawsuit was filed in May 1988 by other neighbors of Combustion on Graves Mountain. *Combustion Chemicals, Inc. v. Spires*, 433 S.E.2d 60 (Ga. App. 1993), *cert. denied*, 1993 Ga. LEXIS 969 (Oct. 12, 1993). The issue was brought into special focus at trial through the testimony of John Brett, who testified that the sole reason that remediation measures were not started prior to plaintiffs' suit in August 1991 was that "we never had reason to believe there was a problem there." Tr. 965. Brett was ultimately forced to concede that Combustion knew of the acid mine drainage

problem at least as early as May 1988, because plaintiffs' counsel confronted him with the fact that the *Spires* lawsuit had been filed at that time and that Brett had actually sat through the *Spires* trial. Tr. 291.

The jury also heard the test results of environmental consultants hired by Combustion in 1989 during *Spires*, which confirmed the existence of pollution and demonstrated that Combustion knew of the acid mine drainage problem long before plaintiffs filed their lawsuit in 1991. The first study, conducted by Dames & Moore in 1989, compared three of the streams running across plaintiffs' property (the McGill, Long, and Goldman streams) to a reference stream unimpacted by mining activity. Plaintiffs' three streams had pH levels as low as 2.6, thousands of times more acidic than the water sampled at the unpolluted reference stream; specific conductivity levels as high as 2,210, approximately 18 times higher than normal; and dissolved iron levels up to 199 milligrams per liter, over 200 times those of the reference stream. PX-12 at 2. The second study commissioned by Combustion in 1989, conducted by Drs. Arnold and Miller (two agronomy professors at the University of Georgia), focused on the Long stream and produced similar results. PX-13.

2. ***Combustion's 1991 cleanup efforts were initiated only under heavy pressure on two fronts.*** In the summer of 1991, Combustion finally began addressing the pollution that had been flowing into plaintiffs' streams, essentially unchecked, since mining operations ended on Graves Mountain in 1986. Even Combustion's 1991 limited cleanup efforts directed toward plaintiffs' streams, which began five years behind schedule, came about only based on the pressure exerted by plaintiffs through their lawsuit, and by the DNR through its administrative action.

In June 1991, the DNR cited Combustion for "a violation of law" (the Georgia Water Quality Standards) involving acid mine drainage with a pH of 2.9 — more than 1,000 times more acidic than normal water — "coming from the pyrite pond and leaving the mine site," and discharges from the holding pond with a pH of

3.2. Tr. 984-85; *see also* Tr. 109. These discharges violated Combustion's permit. Tr. 984-85.

After plaintiffs filed the instant suit in August 1991, Combustion entered into a consent decree with the DNR in September 1991 in which Combustion was compelled to adopt certain remediation measures. By Combustion's own calculation, it had spent only $700,000 on reclamation measures between 1986 and June 1991. Tr. 389, 949-50. Uncontroverted evidence at trial established that by taking inadequate cleanup measures between 1987 and 1993, Combustion was able to retain additional profits of $6 million. Tr. 1216-17.

Moreover, Combustion did not take sufficient steps to ensure that even its new cleanup efforts were adequate. For example, the environmental consultant hired by Combustion to plan reclamation of the minesite, Jerry Williams, warned the company in a 1989 proposal that water would eventually leach away "most of the acidity from the material" in the tailings ponds and that this "would probably contribute to problems downstream," requiring liming and other remediation techniques. DX-15 at 3. Combustion, however, hired Williams solely to "revegetate" its own minesite; Williams was not asked to test or otherwise address the acid mine drainage going into plaintiffs' nearby streams. Tr. 1009-11, 1014. Nor was anyone else. Paul Hall, the Combustion official in charge of Graves Mountain between 1986 and 1990, admitted that Combustion's efforts were not aimed at addressing "whether or not there was acid mine drainage going on to the property of adjacent landowners." Tr. 392. This policy continued for the next *four years* after John Brett replaced Hall, through the time of trial in 1994. Tr. 311-15, 338-39, 990-92.

Dr. Terry, plaintiffs' expert witness, testified that it has been common knowledge within the mining community since the 1970s that both reclamation *and* remediation measures are necessary to stop acid mine drainage. Tr. 737, 1217-18. Dr. Terry further testified that the minesite was "treatable by a number of technologies." Tr. 192. Dr. Terry testified without contradiction that, to effectively reclaim the area, Combustion would have had

to: (1) "strip and reclaim the area as you go," which "typical" mine reclamation plans entail, Tr. 1217; *see also* Tr. 941; (2) add lime to the soil in the reclaimed area so that "when you do have flooding in an area [it] will increase the pH of any run off," Tr. 1217; (3) "use . . . clay caps" "to keep oxygen from coming into contact with potentially acidic materials such as pyrite," *id.*; and (4) build wetlands to "disrupt the flow" of water from the site, raise the water's pH and filter out dissolved heavy metals. Tr. 714-21. Combustion adopted none of these measures.

Even at the time of trial in June 1993, Combustion had failed to use the measures recommended by Dr. Terry to "remediate [the] toxic discharge." Tr. 734. Combustion's remediation efforts were limited to the water flowing into only one stream (the Goldman stream) of the four streams flowing across plaintiffs' property. Expert testimony established that these limited efforts did not stop the pollution in even this stream. Tr. 112-13, 170-71, 1043. A team of expert hydrologists found in 1992 that, despite Combustion's "treat[ing] the water coming out of the holding pond" into the Goldman stream, this stream showed a content of dissolved solids that was abnormally high, sulfate levels over 40 times higher than normal, a "tremendous amount of sediment," and "periodic releases of very low pH water from [the mine]site." Tr. 112-13, 170-71, 1043; PX-10.

Pollution continued to flow into all four of plaintiffs' streams as of the time of trial, Tr. 111-13, 158-59, 167-68, 175, 308-11, 517, 695-97, 725, as Combustion admitted. Tr. 126-27, 309, 1215-16. Plaintiffs' hydrology experts who examined the streams between January and September 1992 concluded that there was a "constant" "problem[] with acid mine drainage" flowing from the minesite (not merely a problem resulting only occasionally from rainfall). Tr. 107-08. The experts concluded that the streams "ha[d] been severely impacted" by acid mine drainage flowing from Combustion's property. Tr. 109-13, 121-122, 159, 161-62, 166-68, 170-71; PX-10. These conclusions were corroborated by the findings of a professor of stream ecology at the University of Georgia, who examined the streams in April 1992. Tr. 1043.

3. Combustion made no serious response to pre-1991 complaints that put it on notice of the pollution. Combustion asserts that plaintiffs rarely complained to it during the close to 20 years that it conducted mining operations on Graves Mountain, and that when owners of downstream properties did complain about escaping water, silt build-up or other problems, it responded decisively to remedy those problems. Pet. 3. Here, again, Combustion distorts the record.

The record reflects that, as early as the 1970s, the father of two plaintiffs (and their predecessor in title), repeatedly called Combustion's site manager to complain about untreated mine waste draining from one of the tailings ponds into the Maloof stream. Tr. 401, 414, 419-20. In 1982, an investigator from the DNR relayed complaints to the minesite manager about a large berm (earthen dam) underneath the west tailings pond that had leaked "[f]or years and years" and flowed across Hepzibah Church Road into the Long stream. Tr. 516. Another neighbor wrote to the county health department in 1986, complaining of fish dying in his stream, Tr. 538; his complaint was referred to the minesite manager. Tr. 539. A county health department official talked to Combustion's manager "numerous times" about problems with the streams, Tr. 539, and in 1991 conveyed his concerns to Combustion's attorneys as well. Tr. 539.

After it retook possession of the site in 1986, Combustion would likely have received even more complaints but for the fact that it has no office on Graves Mountain, receives no mail there, and stations no representative there to receive complaints. Tr. 990. The closest employee is 75 miles away. Tr. 991. Of course, as already discussed, Combustion was further put on notice of the pollution problems in 1988 and 1989 as a result of litigation brought against it by plaintiffs' neighbors, during which Combustion received reports from its own consultants documenting the high levels of pollution. See pp. 6-7, *supra*.

With respect to Combustion's assertion that it has diligently responded to all complaints, the record shows that Combustion, in general, responded to complaints by doing only "enough to

pacify" the neighbors so that they would "stay home and shut up." Tr. 420. For example, a county environmental official testified that he complained to Combustion about a leaky berm as long ago as 1977, but "[t]he leak is still there because they never did anything . . . to it" except to try to plug it with dirt and grass. Tr. 535-36. "The water still runs down through there." Tr. 517; *see also* Tr. 725 ("water is flowing again"). Combustion never even tested the water flowing from the seeps for which it received complaints. Tr. 992, 997, 1010, 1014. Further, Combustion made no effort to notify its neighboring landowners of the levels of pollutants being released into their streams, not even when there were sudden overflows of millions of gallons of polluted water (events of which plaintiffs only learned during discovery in this case). PX-10, Tr. 474, 481, 484, 1211-13.

B. Procedural History

Plaintiffs filed this suit against Combustion on August 9, 1991. As provided under Georgia law, plaintiffs elected to sue only for injunctive relief, together with compensation for loss of use and enjoyment, declining to press a claim for damages to the value of their property. This permitted them to preserve their ability to obtain injunctive relief and other future remedies with respect to the pollution of their streams.

A ruling in Combustion's favor on a motion *in limine*, entered on June 4, 1993, granted Combustion all the relief it sought against the introduction of supposedly prejudicial evidence, including evidence of regulatory violations by Combustion. R3-64.[2] During trial, Combustion objected to plaintiffs' attempt to introduce evidence on the value of the property polluted by Combustion. In so doing, Combustion agreed not to raise any future objection concerning the absence of such evidence, Tr. 622-

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[2] For citations to the record, the number immediately following the "R" is the volume number; the number after the dash is the docket entry number; if another number appears after a dash, it refers to a particular page in the document referenced.

23, 631-32, a promise that it has now forgotten. See p. 17, *infra*.

The trial was bifurcated so that the jury did not even consider punitive damages until it had first awarded compensatory damages — a method even more favorable to Combustion than the method provided for in Georgia state court by O.C.G.A. § 51-12-5.1(d). *See* 4/25/94 Tr. 57-58, 94. The jury awarded the plaintiffs a total of $47,000 for Combustion's interference with their right to the enjoyment and possession of their land, Tr. 1172-74, plus uncontested out-of-pocket expenses of $137,000 and attorney's fees of $90,000. Tr. 352, 1191. The $227,000 in expenses and fees was based on the jury's finding (never appealed) that Combustion had acted in "bad faith," *see, e.g.*, *Ponce de Leon Condominiums v. DiGirolamo*, 232 S.E.2d 62, 64 (Ga. 1977).

During the jury's deliberations on punitive damages, the district court announced its factual findings concerning the claim for equitable relief based on "the same evidence that the jury has heard." Tr. 1244. The district court found that Combustion had "committed a trespass against the land of the named plaintiffs," causing "substantial injury to the neighboring property." Tr. 1252. The court specifically noted the jury's finding that "the defendant had acted in bad faith." Tr. 1245.

To recover any punitive damages at all, plaintiffs were required as a matter of Georgia law — regardless of the federal Constitution — to prove by clear and convincing evidence that Combustion's actions "showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. § 51-12-5.1(b). To recover more than $250,000 each, plaintiffs were required to demonstrate, again by clear and convincing evidence, that Combustion acted "with the specific intent to cause harm." *Id.* at § 51-12.5.1(f). Asked to return an award that would "take the profit out of polluting" and deter and punish similar wrongdoing, Tr. 1240-41, the jury awarded punitive damages in the amount of $3 million to each of the 15 sets of plaintiffs (or their heirs) who owned the 16 parcels of land at issue, for a total of $45 million. Tr. 1255-57; Pet. App. 3a.

In ruling on Combustion's posttrial motions, the district court found the jury's $45 million award to be excessive, but held that $15 million would not be excessive and offered plaintiffs the option of electing a remitted award of that amount, in lieu of a new trial. The district court rejected Combustion's post hoc "theory to the effect that this defendant . . . had consistently followed, abided by and complied with all state laws and regulations and licensing requirements, [but] had been called to task in this courtroom and brought over a barrel." 4/25/94 Tr. 103. The court bluntly stated: "[T]hat's not the case." *Id.* The court further observed that the jury was entitled to conclude that the cleanup money spent by Combustion prior to plaintiffs' suit was "peanuts," simply designed to be "a cheap way of buying time," especially in light of "powerful evidence" that Combustion had spent the money not out of any concern for plaintiffs' riparian property rights, but only when compelled to do so by state regulators. *Id.* at 104-05.

The district court properly did not "abrogate the jury's verdict in its entirety" or "write it down to an insignificant" level. *Id.* at 109. The court recognized that, "if I am to preside over jury trials, take their time, take them away from their home, their offices and their labors, I have an obligation to support and defend their efforts." *Id.* at 108. Accordingly, the court announced that it would do "what the jury said to do, but I will do it in an amount that is sufficient, but not superfluous." *Id.* at 109. The court explained that a punitive award of $1 million would be "a mere inconvenience" — "as much corporate blood as a mosquito would draw." *Id.* The court made clear that it did not arrive at the $15 million figure lightly; to the contrary, the judge revealed that "I don't think that there has been a single 48-hour period that's gone by since June 25th, 1993, that I haven't thought about the amount of punitive damages in this case." *Id.* at 106.

The district court expressly held that the jury's verdict was *not* infected by passion or prejudice and categorically rejected any suggestion that "these proceedings were, in any way, contaminated or permeated by any aspects of prejudice or bias or favor or affection for or against either party." *Id.* at 92-93. "There is no

way that I can make a finding that this trial was fundamentally unfair on the basis of any suggestion or intonation of prejudice or bias or regional or national favoritism. It wasn't." *Id.* at 95.

On appeal, Combustion challenged the award on both state law and federal constitutional grounds. Combustion argued that there was insufficient evidence of willful misconduct and specific intent to cause harm. Yet the Eleventh Circuit soundly rejected Combustion's excessiveness objection, affirming the $15 million award in all respects without opinion, just one week after oral argument. 67 F.3d 314.

On petition for certiorari, this Court first held the petition (No. 95-1072) in abeyance pending *BMW v. Gore*, 517 U.S. 559 (1996), then vacated the judgments and remanded the case to the Eleventh Circuit, 517 U.S. 1217 (1996), which in turn remanded the case to the district court. The scope of the remand was limited to the effect of *Gore* on the judgments

The district court on remand reduced the punitive award to a total of $4.35 million, while acknowledging that "a review of the evidence shows that the jury must have inferred specific intent [to cause harm] from a finding of deliberate indifference." R8-266-6.

The Eleventh Circuit affirmed. It found that "the Georgia statutes provided fair notice to [Combustion] that it might be subject to a substantial penalty for pollution of the streams running through its property." Pet. App. 27a. The court of appeals also noted that "[t]he actual damages awarded were relatively small; yet the state's interest in deterring the conduct — environmental pollution — is strong. In order to achieve this goal, ratios higher than might otherwise be acceptable are justified." *Id.* at 26a. The court further held that the punitive award was "justified by the need to deter this and other large organizations from a 'pollute and pay' environmental policy." *Id.* at 27a.

Subsequently, Combustion completed its settlements of 12 of the 13 judgments in this case, leaving only the $1 million punitive judgment held by the respondents.

REASONS FOR DENYING THE PETITION

Combustion's petition makes extensive reference to *other* cases in an effort to persuade this Court that this case should be used to resolve the question of whether a 100-to-1 ratio between punitive and compensatory damages is reasonable. Combustion's extensive reliance on other cases points to the first reason for denying the petition: this particular case is not an appropriate vehicle to review the question that Combustion has presented given factual peculiarities attributable to Combustion's tactical choices during this litigation.

Further, from the record of this case there is little reason to believe that the "ratio" arguments on which Combustion seeks plenary review, even if accepted, would affect the result of this case — providing a second reason why this Court should deny review in this case and address these "ratio" arguments further, if at all, in one of the cases in which such arguments might actually matter.

I. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR ADDRESSING THE QUESTION PRESENTED BY COMBUSTION

The inappropriateness of this case as a means of reviewing the question presented by Combustion is clear in two separate respects: (a) Combustion seeks review of the court of appeals' decision "sustain[ing] a punitive award of over $4,000,000," Pet. 1, yet it has settled the large bulk of this dollar total; and (b) Combustion's petition sets out a factual predicate for review that simply does not square with the record of this case. We discuss each in turn.

A. This Case Does Not Present the Question of the Reasonableness of a $4 Million Punitive Award

Combustion begins its petition by asserting that "the court of appeals sustained a punitive award of over $4,000,000." Pet. 1.

This statement is highly misleading. As Combustion well knows, it has deliberately chosen to settle 12 of the 13 punitive awards in the case. The remaining judgment, held by respondents, is for only $1 million, Pet. App. 39a — less than 25% of the total of $4.35 million in punitive judgments recently sustained below.

In and of themselves, these settlements make this case an unsuitable candidate for this Court's review. Combustion has strategically decided to resolve 12 of the 13 judgments against it, and to present only one for this Court to examine. Such artificial engineering will hamper a fair resolution in this case. The posture in which Combustion seeks to present this case to this Court is dramatically different from the posture in which the case was tried before a jury in 1993; from the posture in which the district court conducted its first posttrial review in 1994; from the posture in which the first appeal was heard in 1996; from the posture in which this Court vacated the then-extant judgments in light of *BMW v. Gore*; from the posture in which the district court conducted its second posttrial review in 1997; and from the posture in which the court of appeals heard the case below.

In short, the record in this case has been assembled, and the decisions below have been rendered, in a different setting from the one that Combustion now seeks to present to this Court. Both constitutional and prudential principles of justiciability strongly counsel against reviewing Combustion's arguments focusing on the "punitive award of over $4,000,000" that "the court of appeals sustained," Pet. 1, after which Combustion settled all but one of the judgments, thus mooting the issues earlier posed by the $4.35 million in punitive damages. *See, e.g.*, 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-7, 3-8, 3-11 (3d ed. 2000).

Furthermore, the $1 million award remaining in this case is a poor candidate for assessing the ramifications of *BMW v. Gore* for punitive awards. The $1 million judgment held by respondents was produced by the district court as part of its 1994 weight-of-the-evidence remittitur procedure. See pp. 13-14, *supra*. The award has been untouched since that time. It was not produced by the district court's application of the *Gore* factors during its 1997

second posttrial review and it was left unchanged by the court of appeals' review of the judgments under the *Gore* factors.

B. The Question Framed by Combustion Is Not Presented By This Case

The question framed by Combustion is "whether a punitive award that is 100 times the compensatory damages is constitutionally permissible when the compensatory damages are more than nominal and the defendant's conduct is not reprehensible." Pet. i. This question is not in fact presented by this case for several reasons.

1. The ratio between punitive and compensatory damages in this case relied on by Combustion is largely meaningless, given unique aspects of the record created by Combustion's own tactical litigation choices. The award of use-and-enjoyment damages in this case simply cannot be viewed as representing compensation for all of "the actual harm inflicted on the plaintiff[s]," which this Court has instructed is the relevant focus. *Gore*, 517 U.S. at 580.

The $10,000 compensatory award for respondents' loss of use and enjoyment of their land reflects only one minor element of the actual harm caused by Combustion. Under Georgia law, plaintiffs were forced to waive their claim for loss of market value in order to preserve their right to injunctive relief. Tr. 17, 622-23, 629-32; R-3-63 at 13-17. The damages awarded plaintiffs thus do not include the injury done to the value of plaintiffs' land, or the cost of repairing the wrongs intentionally inflicted by Combustion. Tr. 629-30. In fact, at trial Combustion objected to plaintiffs' tender of evidence of the value of the land, Tr. 622-23, and the district court excluded such evidence based on Combustion's agreement that it would "not be heard, within the confines of this lawsuit, ever to complain that there has been a failure or an absence of any showing of fair market value or any disparity between the present polluted and non-polluted fair market value." Tr. 631-32. Combustion has effectively renounced this agreement and now seeks to have the matter both ways.

Under this aspect of *Gore*, any "ratio" evaluation of the punitive award must also place a value on the claim for injunctive relief, given that awards of nominal damages or equitable relief, without any recovery of compensatory damages, are enough to support an award of punitive damages under Georgia law. *Ponce de Leon Condominiums v. DiGirolamo*, 232 S.E.2d 62, 64 (Ga. 1977); *Hudgins & Co. v. J & M Tank Lines, Inc.*, 450 S.E.2d 221 (Ga. 1994), *cert. denied*, 1995 Ga. LEXIS 461 (Ga. Feb. 23, 1995). For example, the courts have long recognized that a claim for injunctive relief should be regarded as having monetary value for purposes of meeting jurisdictional amount requirements. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 347-48 (1977); 14B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3D § 3708, at 239 (1998).

Moreover, the actual ratio between the punitive and compensatory awards here is approximately 4-to-1, not 100-to-1 as Combustion erroneously suggests. Respondents' compensatory award was not limited to $10,000 for the loss of the use and enjoyment of their land. It also included $227,000 awarded to all the plaintiffs (including respondents) for their out-of-pocket expenses and attorneys' fees based on the jury's finding (never appealed) that Combustion had acted in "bad faith." See p. 12, *supra*. In *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), this Court considered the plaintiffs' litigation costs, as awarded by the jury, in computing the ratio between punitive and compensatory damages. *Id.* at 451, 453 (plurality opinion). Considering those costs here, which were a specific item of damages awarded by the jury to plaintiffs, produces a ratio of $1 million divided by $237,000, or about 4.2-to-1, not 100-to-1.

For all these reasons, the ratio cannot be computed based solely on respondents' $10,000 use-and-enjoyment award.

2. The ratio computed by Combustion is also meaningless because the use-and-enjoyment damages sustained by plaintiffs were difficult to quantify. The evidence showed that the injury

sustained by plaintiffs was severe, both economic and non-economic. Combustion's pollution rendered the streams unsuitable for "normal usage or recreational or farm purposes," Tr. 161, and it interfered with plaintiffs' attempts to raise cattle, Tr. 400, 403-05, 427, 429, 430, 432, 499, 554; rent their land, Tr. 576, 577, 580, 644, grow timber, Tr. 442, 592, 606, 616; fish in the streams, Tr. 442, 448, 598; drink from them, Tr. 484-85; swim in them, Tr. 480; and pass the land down to their children and grandchildren in a pristine state. Tr. 329, 442, 454, 465, 482, 502, 554.[3] Thus, Combustion is incorrect in insisting that there is no evidence of "diminution in property value, damage to crops or animals, or other economic loss." Pet. 7. In any event, this Court in *Gore* explained that the non-economic dimension of an injury gives greater (not less) validity to a punitive award, because "the monetary value of noneconomic harm might have been difficult to determine." 517 U.S. at 582.

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[3] Combustion suggests that any harms were the result of the mining operations that had ceased in 1986 and hence fell outside the statute of limitations. That is false. The evidence at trial showed that Combustion's pollution persisted from 1987 to the time of trial. See pp. 4-9, *supra*. Moreover, under Georgia law, liability for tortious acts that cause continuing pollution within four years of the filing of the suit is not barred by the statute of limitations even though the acts causing the continuing trespass occurred more than four years before suit. *Hoffman v. Atlanta Gas Light Co.*, 426 S.E.2d 387, 389-90 (Ga. App. 1992), *cert. denied*, 1993 Ga. LEXIS 336 (Ga. Apr. 8, 1993).

Further, Combustion misstates the relevance of the statute of limitations. Throughout its two decades of mining on Graves Mountain, Combustion knew that, absent concerted efforts at reclamation (i.e., long-term restoration) and remediation (i.e., immediate pollution treatment), its operations would inevitably produce huge quantities of toxic pollutants that would flow into plaintiffs' streams. Evidence of Combustion's pre-1987 knowledge was at minimum admissible under Fed. R. Evid. 404(b) to establish state of mind and to show that Combustion has long been on notice of the need for effective action. *See, e.g., Big Apple BMW, Inc. v. BMW of North Am., Inc.*, 974 F.2d 1358, 1361 (3d Cir. 1992), *cert. denied*, 507 U.S. 912 (1993); *see also TXO*, 509 U.S. at 450 n.10, 457, 461 (plurality opinion) (relying on evidence of fraud and other misconduct not part of plaintiff's slander of title claim).

3. More generally, the appropriate ratio between punitive and compensatory damages in a particular case is not a legal talisman, but an inherently fact-bound issue which is not suitable for this Court's review. In *Gore*, this Court held that the ratio between punitive damages and "the actual harm inflicted on the plaintiff" was one factor for a reviewing court to consider. *Id.* at 580. But the Court made clear that "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award." *Id.* at 582 (emphasis in original); *see also TXO*, 509 U.S. at 459-62 (1993) (upholding 526-to-1 ratio between punitive and compensatory damages); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991) (200-to-1 ratio between punitive damages and out-of-pocket expenses); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 262 (1989) (ratio of punitive to compensatory damages over 100-to-1). In fact, *Gore* explained that a high ratio between punitive and compensatory damages may be appropriate in some cases:

> [L]ow awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, *a particularly egregious act has resulted in only a small amount of economic damages*. A higher ratio may also be justified in cases in which the injury is hard to detect or the *monetary value* of noneconomic harm might have been *difficult to determine*.

517 U.S. at 582 (emphasis added). In the wake of *Gore*, some courts have permitted high ratios between punitive damages and compensable harm,[4] while others have not, *see, e.g.*, Pet. 13-15,

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[4] *See, e.g., Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 164-65 (Wis. 1997) (100,000-to-1); *Lee v. Edwards*, 101 F.3d 805, 810-13 (2d Cir. 1996) (75,000-to-1); *Southeastern Sec. Ins. Co. v. Hotle*, 473 S.E.2d 256, 260-61 (Ga. App. 1996) (45,000-to-1); *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 148 (Iowa 1996), *cert. denied*, 118 S. Ct. 52 (1997) (500-to-1); *United States*

depending on the particular facts of individual cases. In upholding a punitive damage award with a 12-to-1 ratio, for example, Chief Judge Posner explained that "a mechanical ratio, such as two to one or three to one or four to one or even ten to one, would not make good sense." *Cooper v. Casey*, 97 F.3d 914, 919 (7th Cir. 1996). "The smaller the compensatory damages, the higher the ratio of punitive to compensatory damages has to be in order to fulfill the objectives of awarding punitive damages." *Id.*[5]

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v. Big D. Enterprises, Inc., 1999 U.S. App. LEXIS 15121, *15-*17 (8th Cir. July 9, 1999) (100-to-1); *Stevens v. Owens-Corning Fiberglas Corp.*, 49 Cal.App.4th 1645, 1652, 1658-68 (1996), *review denied*, 1997 Cal. LEXIS 61 (Cal. Jan. 15, 1997) (78-to-1); *Schaffer v. Edward D. Jones & Co.*, 552 N.W.2d 801, 817 (S.D. 1996) (30-to-1); *Elder v. Gaffney Ledger, Inc.*, 511 S.E.2d 383, 390 (S.C. App. 1999) (30-to-1); *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456, 468 (Ida. 1996) (26-to-1); *Coleman v. Kaye*, 87 F.3d 1491, 1506 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 754 (1997) (23-to-1).

Combustion discounts some of these cases that have upheld high ratios as involving "nominal or very low damages," *see* Pet. 20 n.5, but does not explain why this is a distinction with a difference. Combustion asks this Court to set out numerical ratio guidelines to govern when compensatory damages "are more than nominal," Pet. i, and it offers ratios that it believes should control where compensatory damages fall "between $10,000 and $50,000," as in this case. Pet. 13. Combustion offers no justification for such categories, which lend themselves more to the practice of numerology than the practice of law.

[5] *See also* Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 65 (1990) ("The greater the divergence between the compensatory damages awarded and the actual costs the conduct imposes upon society, the greater the need for an award greatly exceeding the compensatory damages."); Philip D. Oliver, *Once is Enough: A Proposed Bar of the Injured Employee's Cause of Action Against a Third Party*, 58 FORDHAM L. REV. 117, 153-54 n.136 (1989) ("[I]t seems that low compensatory damages would require a greater deterrent in the form of punitive damages than necessary when compensatory damages are high. . . . [I]f A and B engage in equally wrongful conduct, but A causes $100,000 in harm and B $1,000,000, by what logic is it held that B, having paid ten times as much in compensatory damages, now should be held liable for greater punitive damages than A?").

4. The award in this case is necessary to achieve deterrence by removing Combustion's wrongful gain. A punitive damage award in this case on the order of a few times the $10,000 in use-and-enjoyment damages collected by respondents would give a wrongdoer such as Combustion no incentive to institute necessary remediation and reclamation efforts in a timely fashion, knowing that it stands to save $6 million by doing nothing. As in *TXO*, here a high ratio is constitutionally unobjectionable, especially when the punitive award is compared with the economic gain from the wrongdoing. In this case, the ratio between respondents' $1 million punitive award and Combustion's $6 million actual gain from its intentional, bad-faith trespass is only 1-to-6 (that is, only a small fraction of actual gain) — sixty times lower than the 10-to-1 ratio that this Court in *TXO* suggested would be reasonable. 509 U.S. at 459-62. No case or legal principle cited by Combustion remotely establishes that a punitive damage award of a *fraction* of an intentional wrongdoer's illicit gain should be considered grossly excessive under the Fifth Amendment.

II. IN ANY EVENT, THE $1 MILLION PUNITIVE AWARD IN THIS CASE IS PLAINLY REASONABLE, RENDERING THE "RATIO" ISSUE IRRELEVANT

Even if the question framed by Combustion were actually presented, this Court's review would be unwarranted because a $1 million punitive award in this case is plainly reasonable. The court of appeals held that the punitive award was "justified by the need to deter this and other large organizations from a 'pollute and pay' environmental policy." Pet. App. 27a. The Eleventh Circuit was correct: Combustion retained an illicit gain of $6 million in this case, and a substantial punitive award was justified. The award is also reasonable in light of legislatively authorized penalties in Georgia, which put Combustion on notice of its potential liability, and in light of Combustion's size and financial position.

Thus, the court of appeals' judgment would not change even if Combustion's argument about ratios between punitive and compensatory damages had any merit. Review should be denied because the "ratio" argument, which is the basis of Combustion's question presented, would not affect the proper constitutional analysis in this case.

A. The Award is Reasonable by Reference to Combustion's Actual Gain

An expert witness called by plaintiffs, whose qualifications and methodology for reaching his opinion were unchallenged, testified that Combustion was able to save $6 million between August 1987 and the 1993 trial by failing to adopt proper measures to correct the problems with acid mine drainage entering plaintiffs' property. Tr. 1216-17. This figure does not include pre-1987 profits, such as the gain to Combustion from failing to reclaim while mining operations were ongoing, which in itself was contrary to standard industry practice. Tr. 941, 1217. Combustion had ample opportunity to respond to this testimony but did not rebut it.

Plainly, the imposition of a $1 million punitive award to redress an illicit gain of $6 million is hardly irrational. If anything, the award should have been greater. Under Georgia law, plaintiffs are lower riparian owners who have the absolute right "to have water flow upon [their] land in its natural state free from adulteration," *Kingsley Mill Corp. v. Edmonds*, 67 S.E.2d 111, 112 (Ga. 1951), regardless of whether mining is more profitable than other uses of the land. *See Satterfield v. Rowan*, 9 S.E. 677, 679 (Ga. 1889) ("[Plaintiff] was entitled to have the water flow upon his land from [defendant mining company's] land in its natural state . . . whether the stream of water was more useful for the purpose of mining than it was for domestic purposes").[6]

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[6] *See also* O.C.G.A. § 51-9-7 ("The diverting of the stream in whole or in part from its natural and usual flow, or the obstructing thereof . . ., or the

The Georgia courts have repeatedly held that the failure properly to remediate pollution constitutes a trespass, subjecting the trespasser to punitive damages, and that a defendant cannot immunize itself merely by showing that it made *some* half-hearted efforts at remediation.[7] The jury found at trial that Combustion trespassed on plaintiffs' riparian rights with full knowledge that it was doing so, with "specific intent" to continue trespassing, and in "bad faith." These findings remain the law of the case.

Accordingly, this Court's decision in *BMW v. Gore* fully *supports*, rather than undermines, the punitive damage award here. *Gore* specifically upheld the power of a State to impose punitive damages "to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition" in order to "protect[] its own consumers and its own economy." 517 U.S. at 568, 572. In *TXO*, which was reaffirmed in *Gore*, a plurality noted, "in addition to TXO's vast wealth, the tremendous financial gains that TXO hoped to achieve" and "the lucrative stream of royalties" that TXO hoped to win. 509 U.S. at 461-62. This Court indicated that

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polluting thereof so as to lessen its value to the owner of such land shall constitute a trespass upon the property"); *Brooks v. Ready Mix Concrete Co.*, 96 S.E.2d 213, 214-16 (Ga. App. 1956) (citing *Gainesville, J. & S. R. Co. v. Edmondson*, 29 S.E. 213 (Ga. 1897)) (reaffirming ancient and absolute right against trespass caused by defendant's use of its real property as distinguished from, for example, a railroad's negligent discharge of sparks incident to its operation of a train along a right of way).

[7] *See Ponce de Leon Condominiums v. DiGirolamo*, 232 S.E.2d 62, 64 (Ga. 1977) (punitive damages warranted even though defendant relied on expert advice that its activities would cause no water run-off problem, and subsequently "made some effort to alleviate" the effects of problem); *Hudgins & Co. v. J&M Tank Lines, Inc.*, 450 S.E.2d 221, 222 n.1 (Ga. App. 1994), *cert. denied*, 1995 Ga. LEXIS 461 (Ga. Feb. 23, 1995) (a knowing failure to effectively remediate pollution, even if defendant "did take some actions to remediate," is willful misconduct that warrants punitive damages); *Hoffman v. Atlanta Gas Light Co.*, 426 S.E.2d 387, 389-91 (Ga. App. 1992), *cert. denied*, 1993 Ga. LEXIS 336 (Ga. Apr. 8, 1993) (knowing failure to clean up hydrocarbon spillage from pipeline constitutes continuing trespass, even after the leaks have been fixed, permitting award of punitive damages).

an award of even ten times the size of TXO's expected gain would be reasonable. In *Haslip*, which was also reaffirmed in *Gore*, the Court approved consideration of "the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss" as a factor in judging the reasonableness of an award. 499 U.S. at 22.

Combustion's real quarrel is with substantive Georgia law. It contended below that it should not be punished in any substantial amount for polluting plaintiffs' land, because the cost of cleaning up its streams containing acid mine drainage before they reach plaintiffs' land was supposedly greater than the diminution in the alleged market value of plaintiffs' land. This argument is triply flawed.

1. Combustion's argument is inconsistent with the jury instructions in this case. The jury was instructed as follows:

> In considering whether you will award punitive damages and in what amount: Such award is not meant to be compensation, but should be fixed in *an amount necessary to deter future acts of a similar nature*. It is an amount, as measured by the enlightened conscience of an impartial jury, which will be required to deter future wrongful acts.

Tr. 1195 (emphasis added). The jury was not instructed that punitive damages should be limited by the value of plaintiffs' land or any similar factor. Instead, consistent with the jury instructions focusing on deterrence of future wrongful acts, the jury was urged in closing argument — without objection — to "take the profit out of polluting" and to render a verdict that would "restore the dignity of property rights." Tr. 1240-41.

Whether the punitive award is excessive must be measured by applying the jury instructions to the factual record, which are now law of the case, not by asking whether the facts would support the award under some alternative version of the law. *See, e.g., Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 675

(7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986); *see also Quinones-Pacheco v. American Airlines, Inc.*, 979 F.2d 1, 4 & n.3, 5 (1st Cir. 1992); *Bogan v. Stroud*, 958 F.2d 180, 183-84 (7th Cir. 1992); *Sims v. Mulcahy*, 902 F.2d 524, 535-36 (7th Cir.), *cert. denied*, 498 U.S. 897 (1990).

2. Combustion's argument is simply off limits to a federal court under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Combustion contends that, whatever substantive Georgia law has to say on this subject, the federal Constitution somehow commands that a State can never impose a penalty on a polluter who trespasses on the property owned by another, if that penalty is linked not to *the fair market value of the land* (a "pollute and pay" system), but is instead designed to deter the polluter from causing the harm in the first place, by setting the penalty in reference to the level of *the financial benefit the polluter receives* from refusing to implement the necessary cleanup measures. Combustion's argument is nothing short of *Lochner*ism. Georgia is no more required to adopt Combustion's view of economics than it is required to adopt "Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Further, "pollute and pay" is inconsistent with the traditional approach to property rights in this country. "[O]therwise, a person so disposed might forcibly dispossess another of any article of property at his pleasure, and compel the owner, however unwilling, to accept of the value in its stead." *Edwards v. Beach*, 3 Day 447, 450 (Conn. 1809). Indeed, giving polluters like Combustion what is, in effect, a judicially enforceable power of private eminent domain would raise serious constitutional questions under the "public use" requirement of the Takings Clause. *E.g., Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 77-80 (1937) (Brandeis, J.).

3. Third, Combustion's argument is also profoundly flawed as a matter of elementary legal principle because it confuses *property* rules with *liability* rules. Some rights and assets, such as the entitlement to be free from breaches of contract or negligently

caused accidents, are protected only by liability rules. A defendant who violates such an entitlement need pay only ordinary compensatory damages. But the distinguishing characteristic of a "property right," such as the right under Georgia law to unpolluted water, see pp. 23-24 & n.6, *supra*, is that "someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction." Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972); *see also Symposium: Property Rules, Liability Rules, and Inalienability: A Twenty-Five-Year Retrospective*, 106 YALE L.J. 2081 (1997).

Even if social welfare would be increased if the property right in question — here, the right to control the level of pollution in plaintiffs' streams on Graves Mountain — were in the hands of Combustion rather than plaintiffs, that would be no reason to allow Combustion unilaterally to decide to pollute and pay merely compensatory damages. This property right, initially vested in plaintiffs under well-settled Georgia law, can easily be transferred to Combustion through legitimate avenues of market exchange. Indeed, Combustion's settlements with respect to 12 of the 13 judgments effectuated this very type of property transfer.

If Combustion had bargained with plaintiffs, the purchase price would have been determined by the value of the property to plaintiffs (which was not in evidence before the jury)[8] and the

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[8] Combustion asserted below that the estimated aggregate fair market value of plaintiffs' land (which of course might be less than the value of the land to plaintiffs personally) was $1.347 million. But this figure was never introduced into evidence at trial. Indeed, on Combustion's own motion, all evidence of the land's value was barred as irrelevant to the case. Tr. 622:10-623:7, 631:18-632:14, 659:21-660:9. Combustion explicitly waived any argument that might depend on the value of plaintiffs' land. Tr. 17, 622-23, 629-32; R-3-63 at 13-17. A federal court "cannot, consistent with the Seventh Amendment, evaluate a jury's verdict based on evidence that the jury was not permitted to consider at trial." *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 108 (4th Cir. 1991); *see also Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 280 n.26 (1989).

value of the property to Combustion (at least $6 million). Permitting Combustion to escape such a bargaining process by authorizing it to trespass at the price of paying only compensatory damages would improperly allow it to retain all the gains from exchange that would have been divided between the parties had they freely bargained over the sale of the property.[9]

B. The Award is Reasonable By Reference to Legislatively Approved Penalties

In *Gore*, this Court made clear that "[c]omparing the punitive damage award and the civil or criminal penalties that *could* be imposed for comparable misconduct" provides another test for judging excessiveness. 517 U.S. at 583 (emphasis added). This factor demonstrates the reasonableness of the award in this case.

First, this Court in *Gore* considered the size of awards "that would be permissible under [state tort-reform] statutes." *Id.* at 582 n.36. Here, it is notable that this case was tried under a Georgia statute capping punitive damages at $250,000 except where a plaintiff can prove specific intent to cause harm. O.C.G.A. § 51-12-5.1(f). Thus, the Georgia legislature has decided *not* to impose a limit on punitive damages in cases like this one. It has singled out such cases as ones in which severe punishment is warranted.

In addition, this action was brought by 23 separate plaintiffs owning 16 different plots of land. Even if each plaintiff had received no more than the $250,000 allowed by the Georgia

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[9] It bears emphasis that even if the property right in question could not easily be transferred, there is no obvious basis for questioning the policy judgment under Georgia law that mining companies such as Combustion still may not pollute the streams in question, even if such pollution could increase societal wealth. *See, e.g.*, Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1669-70 & n.62 (1998) (observing that to rely on principles of economics to justify a societal goal of wealth maximization is a "doomed effort"). *See also* Ronald Dworkin, *Is Wealth a Value?*, in A MATTER OF PRINCIPLE 237, 242-44 (1985); Anthony T. Kronman, *The Value of Moral Philosophy*, 111 HARV. L. REV. 1751, 1752 & n.5 (1998).

legislature in cases *not* involving specific intent to harm, the total punitive damage award in this case permitted under Georgia law would have been $5.75 million. In this case, of course, the jury found that Combustion acted with specific intent to cause harm, a finding that was upheld in the earlier appeal. Hence, the Georgia legislative scheme provides additional support for the award.

Also relevant in assessing the reasonableness of the instant award is the Georgia Water Control Act, which Combustion violated. Tr. 984-86. Under this Georgia statute, civil penalties of up to $100,000 per violation per day may be assessed for repeated violations. O.C.G.A. § 12-5-52(a). In addition, the Act carries criminal penalties; knowing violations are punishable as felonies. O.C.G.A. § 12-5-53(a) & (c). The district court acknowledged that, if the maximum legislatively authorized penalty had been imposed on Combustion, it would have faced a $146 million fine. R8-266-10. *Gore* instructs a focus on the "maximum civil penalt[ies]" "that *could* be imposed," 517 U.S. at 583-84 (emphasis added), not on the patterns of administrative enforcement.

C. The Award is Reasonable by Reference to Combustion's Size and Financial Position

The punitive award is also eminently reasonable in light of Combustion's 1990 purchase price of $1.6 billion. Tr. 1199. The district court previously explained that this was "one of the most apposite cases" for considering the defendant's financial position, since an award of "one million dollars" would be "a mere inconvenience" — "as much corporate blood as a mosquito would draw." 4/25/94 Tr. 109.

This Court has repeatedly noted the "well-settled law" that the size of a punitive damage award may be justified as constitutionally reasonable by reference to a defendant's wealth. *TXO*, 509 U.S. at 462 n.28 (plurality opinion). Justice Breyer, joined by Justices O'Connor and Souter, explained in *Gore* that "one can understand the relevance of this factor to the State's interest in retribution." *Gore*, 517 U.S. at 591 (concurring opinion); *see also*

Haslip, 499 U.S. at 21-22; *Browning-Ferris*, 492 U.S. at 300 (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) (evidence of wealth "is traditionally admissible as a measure of the amount of punitive damages that should be awarded"); *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 641-42 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1846 (1997) (concluding that wealth remains relevant under *Gore*); RESTATEMENT (SECOND) OF TORTS § 908(2) & comment e (1979); Annotation, *Punitive Damages: Relationship to Defendant's Wealth, As Factor in Determining Propriety of Award*, 87 A.L.R.4TH 141, 151 (1995) (noting that the "vast majority of courts" permit wealth to be considered).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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September 10, 1999